Supreme Court, U.S.
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IN THE
Supreme Court of the United States
October Term, 1993

KAREN LIVADAS,
Petitioner,

v.

LLOYD AUBRY, in his official capacity as Labor Commissioner for the State of California,
Respondent.

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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The Commissioner creates a misleading impression by reciting specific provisions of Livadas's union contract, Opp. Brief at 6-7. The Commissioner did not disqualify Livadas because of any particular substantive term of her union contract. The agency issues a form rejection letter (App. 8a) solely because the applicant has a union contract with grievance arbitration, no matter what other provisions that agreement contains. *See* App. 25a.

The Commissioner is also wrong to argue, at Opp.

Brief 12-13, that federal relief in this case would require the federal courts to review all of his agency's eligibility decisions. As Judge Kozinski points out, the state agency has sole authority to decide the merits of Livadas's state-law claim; Livadas is only seeking injunctive relief against the Commissioner's threshold rule excluding applicants on the basis of their federally protected activity. App. 16a-17a.

The Commissioner cannot camouflage the federal significance of this practice by labelling it a "*sua sponte* dismissal on jurisdictional grounds." *See* Opp. Brief at 12. No matter how the Commissioner rationalizes this policy, the fact remains that California's labor preemption rules systematically bar union workers from state-law employment benefits, without any adversary proceedings.[1] Under these circumstances, the federal courts must exercise § 1983 jurisdiction when state agencies apply an "irrebuttable presumption" that penalizes applicants for their exercise of federal rights. *See D.C. Court of Appeals v. Feldman*, 460 U.S. 462, 487 (1983). Otherwise, the federal power asserted in *Golden State Transit Corp. v. City of Los Angeles*, 475 U.S. 608 (1986) will have no effect against local rules that conflict with federal labor law.

[1]The absence of adversary proceedings is also fatal to the Commissioner's suggestion that Livadas proceed against his agency in state court for a writ of mandamus. Unlike the stockbroker plaintiff in *Baker v. Aubry*, 216 Cal.App.3d 1259 (1989), Livadas was excluded without any hearing or taking of evidence. Such proceedings are a prerequisite to the exercise of administrative mandamus in the California courts, see Cal.Code of Civ.Pro. § 1094.5(a). In the absence of such a hearing, the California courts treat the Commissioner's refusal to proceed on a charge as an unreviewable exercise of prosecutorial discretion. *See Painting and Drywall Work Preservation Fund v. Aubry*, 206 Cal.App. 3d 682, 687 (1988).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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